

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

CAROLYN JOSEPH,

Plaintiff,

v.

KMART CORPORATION,

Defendant

CIVIL NO. 1999/133

TO: Lee J. Rohn, Esq.
Andrew Simpson, Esq.

ORDER ON PLAINTIFF'S MOTION *IN LIMINE*
REGARDING EXEMPLAR STOOLS

THIS MATTER came for consideration on Plaintiff's Motion *in Limine* regarding exemplar stools. Kmart filed opposition to the motion and Plaintiff filed a reply to such opposition.

Plaintiff's motion seeks to "bar photographs of 'exemplar' stools and the exemplar stools themselves from being introduced as evidence at trial of this matter." The reference is to three stools produced by Kmart at its Rule 30(b)(6) deposition on June 16, 2000. Plaintiff cites testimony of Kmart's deponent, Clarence Green that such stools were not the ones used by Plaintiff and that Kmart no longer carries the stool at issue. Plaintiff's own testimony was that the three stools provided did not resemble the one involved in her accident.

Plaintiff argues that the "exemplar" stools are not

representative of the one at issue and are not admissible. Plaintiff asserts, without citation, that the exemplar stools "were in fact much sturdier than that which the Plaintiff used..."

In opposition to the motion, Kmart cites Mr. Green's testimony that the stool in question was "'very similar but smaller' than one of the exemplar stools (exhibit 4 to Green's deposition)." Kmart argues that the jury is entitled to see such exhibit and consider whether it is probable that "such a sturdy stool would have collapsed and yet not shown any sign of damage after the collapse," and "whether it is likely that the Plaintiff could have suffered a sever injury if the actual stool is smaller than Exhibit 4 which is only 16 inches in height."

Kmart offers that Plaintiffs also used all three exemplar stools in her deposition to help identify the actual stool by comparison. Kmart argues that the exemplars will assist the jury in understanding the facts and that "Kmart will emphasize the size differential."

Courts have allowed non-identical but similar items to be used during testimony for demonstrative purposes. *U.S.A. v. Weeks*, 919 F.2d 248, 253-54 (5th Cir. 1990); *U.S.A. v. Cox*, 633 F.2d 871, 873-74 (9th Cir. 1980); *Hoffman v. Niagra Machine and*

Tool Works Co., 683 F.Supp. 489, 492-93 (E.D. Pa. 1988); *Benzel v. Keller Industries, Inc.*, 567 N.W. 2d 552, 558 (S.C. Neb. 1997). In this case, Kmart's corporate representative, Clarence Green testified that one of the stools presented was "very similar" to the one at issue and that the stool at issue "might have been a little smaller." (Plaintiff's "Exhibit 1" at p. 19). Plaintiff testified that the subject stool did not resemble any of the exemplars presented (Plaintiff's reply, "Exhibit 1", p. 12).

Kmart has offered no testimony that any of the exemplar stools was of equivalent sturdiness to the stool at issue.

This matter concerns injuries allegedly suffered by Plaintiff when a stool upon which she was sitting collapsed. The mechanics of such event are not unduly technical or complicated. See: *Guillory v. Domtar Industries, Inc.*, 95 F.3d 1320, 1331 (5th Cir. 1996); *Sterkel v. Fruehauf Corp.*, 975 F.2d, 528, 532 (8th Cir. 1992). Because the subject stool is unavailable demonstrative use of a similar stool could help clarify certain testimony. *Hoffman* 683 F.Supp. at 493 and *Benzel* 567 N.W. 2d at 558.

Accordingly, it is hereby;

ORDERED as follows:

1. Defendant may use the exemplar stool referred to at page 19 of Clarence Green's deposition (depo exhibit "4") OR a photograph thereof as a **demonstrative exhibit** to facilitate testimony with regard thereto. Kmart may not demonstrate or argue the sturdiness of such exemplar stool.
2. Kmart shall clarify that such exemplar stool is not the one in issue and Plaintiff may freely cross-examine on the degree of similarity. Plaintiff may also request that the jury be instructed that the exemplar stool is different from the one at issue and is not indicative of the sturdiness thereof.¹
3. Unless otherwise then ordered by the trial judge, the exemplar stool and any photograph thereof shall not be admitted as exhibits.

ENTER:

Dated: February 26, 2001

JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

ATTEST:
WILFREDO MORALES, Clerk of Court

By: _____ Deputy Clerk

1. *U.S. v. Cox*, 633 F.2d 871, 874 (9th Cir. 1980); *Martinez v. W.R. Grace Co.*, 782 P.2d 827, 830 (Ct. Appeals Col. 1989).